IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 12TH DECEMBER 2006 / 21ST AGRAHAYANA 1928

RPFC.No. 182 of 2006()

MC.291/2003 ON THE FILE OF FAMILY COURT, ERNAKULAM

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PETITIONER

K.A.SATHYABHAMA, W/O.RAGHUVARAN,
H.NO.31/5120, SUNIL NIVAS, PANAMPALLY NAGAR,
ERNAKULAM.

BY ADV. SRI.T.RAJASEKHARAN NAIR

RESPONDENTS:

RAGHUVARAN, S/O.NARAYANAN,
MUNNIRAYIL HOUSE, MARADU P.O.,
ERNAKULAM.

BY ADV. SRI.C.P.UDAYABHANU

THIS REV.PETITION(FAMILY COURT) HAVING BEEN FINALLY HEARD ON 12/12/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.HEMA, J.

R.P.(FC).NO.182 of 2006

Dated this the 12th day of December, 2006

O R D E R

The Revision Petitioner filed a petition under Section 125 of the Code of Criminal Procedure ('the Code', for short) against the respondent herein claiming maintenance to herself, as the legally wedded wife of the respondent. The Family Court passed an order allowing the revision petitioner to recover Rs.1,500/- per month from 27.4.2004 till 31.1.2005. She is also allowed to recover Rs.600/- per month from the respondent for maintenance from 1.2.2005 onwards. The said order is challenged with respect to the quantum of maintenance.

2. Learned counsel for petitioner submitted that the court below failed to consider the entire amount or income received by the respondent per month while fixing the quantum of monthly maintenance at Rs.1,500/-. The court has considered only Rs.7,555/- as the total amount of salary which is obtained by the respondent, But, this is not consistent with the figure shown in Exhibit A1, it is argued.

3. On going through Exhibit A1, it is seen that the total salary is shown as Rs.11,379.50. The net pay is shown as Rs.6,789.50. But the trial court, taking into account certain items such as basic pay, D.A etc., has computed the income as Rs.7,555/- and ordered the respondent to pay one-fifth of the amount which comes to Rs.1,500/-. It is not clear from the

order why the total amount of salary or the net pay was not taken into consideration for computing the income and why Rs.7,555/- was taken as the basis to fix the quantum. No reasons are assigned to confine the income to Rs.7,555/-.

4. Learned counsel for petitioner also pointed out that the court below has taken into account only Rs.2,000/- as additional income which the respondent is receiving per month as interest from the fixed deposit and also Rs.928/- per month as the pension, for fixing the quantum of maintenance to be paid to the revision petitioner. It was pointed out that as per the deposition of RW1, he has admitted that he is residing not in his house, but his own house has been rented out for Rs.2,000/-. Learned counsel for revision petitioner submitted that this admitted income was not taken into account for fixing the quantum of maintenance to be paid from 1.2.2005 onwards, with effect from the date of retirement.

5. On going through the records, I find that there is some force in the argument. The respondent did not make any submission, except seeking an adjournment. The court below failed to take into account certain relevant facts while fixing the quantum. It is also curious to note that the petitioner was allowed to "recover" the amount and there is no direction to the respondent to "make" the payment. As per Section 125 of the Code, the Magistrate's Court is empowered to pass an order against such person "to make" a monthly allowance for maintenance. But no such order has been passed. Without passing an order to make payment, and

without there being a default, strictly speaking, it may not be possible for the revision petitioner o recover the amount under Section 125(3) of the Code. As per Section 125(3) of the Code, if any person so ordered fails without sufficient cause to comply with the order, the Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, etc. Since there is no positive order by which the respondent is directed to pay the maintenance, the order cannot be said to be quite legal. This is also an illegality committed by the court below which may lead to serious consequences while taking steps to execute the order.

In the above circumstances, I find that the order under challenge is liable to be set aside. The case is remanded for fresh consideration and disposal in accordance with law, after giving an opportunity of hearing to both sides. The parties shall appear before the trial court on 27.12.2006. The matter shall be disposed of within two weeks thereafter.

K.HEMA, JUDGE

vgs.